



California Fair Political Practices Commission

September 7, 1989

Everett Jenkins
Assistant City Attorney
City of Richmond
City Hall, Room 330
2600 Barrett Avenue
P.O. Box 4046
Richmond, CA 94804

Re: Your Request for Advice
Our File No. A-89-465

Dear Mr. Jenkins:

This is in response to your letter requesting advice on behalf of Richmond City Councilmember John Ziesenhenné concerning his responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTION

May Councilmember Ziesenhenné participate in decisions concerning a waste-to-energy plant proposed by East Bay Sanitary Service where the decision may have a foreseeable financial effect on M. A. Hays Company, a source of income to the councilmember.

CONCLUSION

Councilmember Ziesenhenné may participate in decisions concerning the waste-to-energy plant unless the decisions will increase or decrease the gross revenues, assets or liabilities of M. A. Hays Company by \$10,000 or more, or increase or decrease M. A. Hays Company's expenses by \$2,500.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS

East Bay Sanitary Service ("East Bay") has submitted a proposal to the City of Richmond concerning a proposed waste-to-energy plant. The proposal will be presented to a variety of public agencies, including the Richmond City Council, the West Contra Costa County Solid Waste Management Authority (the "authority") and the West Contra Costa County Joint Powers Agency (the "agency"). Councilmember Ziesenhenne is a board member with the agency and an alternate member of the authority.^{2/}

In addition, Councilmember Ziesenhenne is an independent insurance agent with the M. A. Hays Company ("M. A. Hays") from which he receives commission income and a monthly automobile allowance of \$300. The aggregate income from M. A. Hays is greater than \$250 a year.

M. A. Hays is retained by East Bay and another private business, Bay City Refuse ("Bay City"), to administer their pension. You have informed us that M. A. Hays is compensated on a commission basis with respect to the pension funds. The councilmember is not involved in the administration of either pension.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his official position to influence a governmental decision in which the official has a financial interest. A "public official" is defined in Section 82048 to include every member, officer, employee or consultant of a state or local government agency.

Section 87103 specifies that an official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars

^{2/} You stated that the authority is advisory in nature. If the members of the authority are not members of a decision-making board or commission, they are not "public officials" within the meaning of Section 87100, and are not subject to the disclosure and disqualification provisions of the Act. However, this issue has not been presented to us in this letter, and consequently, we reach no conclusion with respect to it.

(\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(Section 87103(c).)

Councilmember Ziesenhenné receives commission income and an automobile allowance from M. A. Hays which is greater than \$250 in the past 12 months. (Section 82030.) You stated that the councilmember has no financial involvement with any of the business entities involved with the exception of M. A. Hays. Thus, only M. A. Hays is a potentially disqualifying financial interest of the councilmember and he may not participate in any decision that will reasonably foreseeably have a material financial effect on them.^{3/} (Section 87103(c).)

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPFC Ops. 198, copy enclosed.)

You have stated that the decision may have a foreseeable financial effect on M. A. Hays because approval of the waste-to-energy plant might result in East Bay expanding their operations which in turn would increase the pension fund and commission that M. A. Hays receives. Similarly, depending on the location of the plant, Bay Cities may have an advantage or disadvantage with respect to competitors due to the hauling distances. This advantage may also result in an expansion of Bay Cities' operations which in turn would increase the pension fund and commission that M. A. Hays receives. While it is not certain that all the necessary intervening events will occur, it is possible that the new project will bring about such results. For the purposes of this letter we will assume that a financial effect on M. A. Hays resulting from the decisions is foreseeable.

However, the financial effect on M. A. Hays must be both foreseeable and material to result in the councilmember's disqualification. The Commission has adopted differing guidelines to determine whether an effect is material, depending on the specific circumstances of each decision. For example, where a source of income is directly before the public entity on which the councilmember is serving, Regulation 18702.1(a) (copy enclosed) provides that the effect of the decision on a source of income is

^{3/} The financial effect on Bay Cities and East Bay is only relevant in determining the financial effect on M. A. Hays.

deemed material and disqualification is required.^{4/} (Combs Advice Letter, No. A-89-177, copy enclosed.) M. A. Hays is not directly involved in the waste-to-energy plant proposal.

In addition, the councilmember is also required to disqualify himself from participation in decisions which indirectly have a material financial effect on M. A. Hays. Whether the indirect effect on a business is material depends on the financial size of the business entity. For a relatively small business entity, the effect of a decision is material where:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in the increase or decrease in the value of assets or liabilities of \$10,000 or more.

(Regulation 18702.2, copy enclosed.)

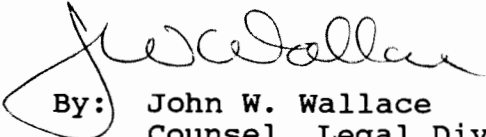
Consequently, Councilmember Ziesenhenné is required to disqualify himself from participating in any decision which could foreseeably increase or decrease the gross revenues, assets or liabilities of M. A. Hays by \$10,000 or more, or increase or decrease their expenses by \$2,500. We do not have precise information concerning the financial effect of the decision on M. A. Hays. However, according to the facts provided, it does not appear that the effect on M. A. Hays will be sufficiently material to warrant the councilmember's disqualification.

^{4/} A source of income is directly before a public entity when the source initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of, the proceeding. A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity. (Regulation 18702.1(b).)

If you have any further questions regarding this matter,
please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh

Enclosures

Office of the City Attorney

CITY OF RICHMOND

City Hall Room 330
2600 Barrett Avenue, Post Office Box 4046
Richmond, California 94804
(415) 620-6509

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AUG 9 3 15 PM '89

MALCOLM HUNTER
City Attorney

August 7, 1989

Katherine Donovan
General Counsel
Fair Political Practices Commission
428 "J" Street, Suite 800
Sacramento, California 95814

Dear Ms. Donovan:

This office has been informed (see Attachments 1 and 2) of a possible conflict of interest of Councilperson John Ziesenhenne with regards to a proposed waste-to-energy facility. As the attachments indicate, the possible conflict of interest stems from the fact that East Bay Sanitary Service has a pension fund which is administered by M. A. Hays Company, an insurance company which houses the offices of Mr. Ziesenhenne. According to the attachments, East Bay Sanitary Service would have been financially impacted by the waste-to-energy plant and, consequently, M. A. Hays Company would have been financially impacted as well. While there has not been any action taken on the waste-to-energy facility, there is now pending before the Richmond City Council an agreement concerning the construction of a solid waste transfer station which could affect the financial condition of East Bay Sanitary Service.

In our discussion with Councilperson Ziesenhenne on this matter, we have been informed that Mr. Ziesenhenne does not directly administer the East Bay Sanitary Service pension fund and derives no income from East Bay Sanitary Service. Mr. Ziesenhenne functions essentially as an independent agent working on commissions for M. A. Hays Company. He does receive a monthly automobile allowance of \$300 from the company but otherwise his compensation is dependent upon his commissions, none of which comes from East Bay Sanitary Service. Mr. Ziesenhenne estimates that the income M. A. Hays Company derives from the administration of the East Bay Sanitary Service, Bay View Refuse Company and Bay Cities Refuse Service pension plans averages about \$700 per year. Mr. Ziesenhenne further informs us that efforts by M. A. Hays Company to divest itself of responsibility for administering

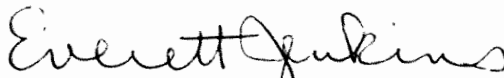
Ms. Katherine Donovan
August 7, 1989
Page 2

the pension funds have been rebuffed by East Bay Sanitary Service.

Being cautious on this issue, this office has advised Mr. Ziesenhenne not to participate or vote on the immediate preliminary agreement concerning aspects of the proposed transfer station. However, since the transfer station will be a recurring issue further guidance on Mr. Ziesenhenne's ability to participate is warranted. Accordingly, the question we wish to pose to, and have answered by, the Fair Political Practices Commission is whether the relationship between Mr. Ziesenhenne, M. A. Hays Company, and East Bay Sanitary Service constitutes sufficient cause for Mr. Ziesenhenne's disqualification from participating in the hearings or proceedings regarding the transfer station.

If you need any additional information, please feel free to call me at (415) 620-6509 and I shall endeavor to ascertain the answers.

Very truly yours,



EVERETT JENKINS
Assistant City Attorney

cc: John Ziesenhenne

EJ:llt

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MAR 18 AM 10:01

BIANCHI, PAXTON, ENGEL, KEEGIN & SHERWOOD
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44 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 777-4360
CABLE ADDRESS BHSH
OF COUNSEL
SUSAN LANDON MARKS

March 16, 1988

Mr. Malcolm Hunter
City Attorney
Richmond City Hall
Post Office Box 4046
Richmond, California 94804

Re: John Ziesenhennel/Bay Cities Refuse/Bayview Refuse

Dear Mr. Hunter:

Thank you for your letter of March 14, 1988.

The concern my clients have is that they might be drawn into a charge of conflict of interest if Mr. Ziesenhennel participates in any discussions or actions regarding the proposed garbage-burning plant. The reason for this is that if a decision is made to locate the plant closer to where Bay Cities Refuse and Bayview Refuse operate, the two companies would have a great advantage over competitors, because their hauling distance would be less. This could result in a very material financial benefit to my clients. It could also have a significant effect on the pension funds administered through the office of Mr. Ziesenhennel.

It may seem unusual that my clients are worried about a possibility which would work to their advantage, but they feel strongly that both the fact as well as the appearance of any conflict of interest should be avoided. If I can provide any further information, please do not hesitate to let me know.

Very truly yours,

Albert Bianchi
Albert Bianchi

AB:tb

cc: Mr. Lewis R. Figone

Office of the City Attorney

CITY OF RICHMOND

City Hall Room 330
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MALCOLM HUNTER
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Very truly yours,



EVERETT JENKINS
Assistant City Attorney

cc: John Ziesenhenne

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RECEIVED
CITY ATTORNEY'S OFFICE
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OF COUNSEL
SUSAN LONDON MARKS

March 16, 1988

Mr. Malcolm Hunter
City Attorney
Richmond City Hall
Post Office Box 4046
Richmond, California 94804

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Very truly yours,

Al Bianchi
Albert Bianchi

AB:tb

cc: Mr. Lewis R. Figone

WENDEL, ROSEN, BLACK, DEAN & LEVITAN

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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VICTOR D. ROSEN, INC
DONN L. BLACK
MICHAEL A. DEAN
JACOB LEVITAN, INC.
DEANNA D. LYON
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MARIAN KENT ORTIZ

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1221 BROADWAY
OAKLAND, CALIFORNIA 94612

1988 MAR 25 AM 9:46

PLEASE REPLY TO:
P. O. BOX 2047
OAKLAND, CALIFORNIA 94604-2047

TELEPHONE: (415) 834-6600
CABLE ADDRESS: WENLAW
TELECOPIER: (415) 834-1928

March 24, 1988

Mr. John W. Ziesenhenne
M.A. Hays and Company
P.O. Box 305, Station A
Richmond, CA 94808

Re: East Bay Sanitary Company/Disqualification for
Possible Conflict of Interest

Dear Mr. Ziesenhenne:

This firm represents East Bay Sanitary Company. As you are aware, East Bay Sanitary Company provides refuse hauling for the City of El Cerrito.

I am writing to express our client's concern regarding a potential conflict of interest. The conflict of interest arises from your firm's administration of East Bay Sanitary Company's pension funds and your membership on the West Contra Costa County Solid Waste Management Authority and West Contra Costa County Joint Powers Agency. Both of these public agencies are considering an application with respect to a proposed waste-burning plant in Contra Costa County. A specific conflict of interest arises from the fact that the construction and location of a waste-burning plant would directly affect the financial condition and operations of East Bay Sanitary Company. Any financial impact of the waste-burning plant on East Bay Sanitary Company, in turn, would materially affect the pension funds administered by M.A. Hays and Company.

Under these circumstances, we request that you disqualify yourself from participating in hearings or proceedings regarding the waste-burning plant.

Sincerely,

WENDEL, ROSEN, BLACK, DEAN & LEVITAN



Randall L. Kiser

RLK:lt

cc: Malcom Hunter



California Fair Political Practices Commission

August 10, 1989

Everett Jenkins
Assistant City Attorney
P.O. Box 4046
Richmond, CA 94804

Re: Letter No. 89-465

Dear Mr. Jenkins:

Your letter requesting advice under the Political Reform Act was received on August 9, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John McLean an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan
General Counsel

KED:plh